

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP551

Cir. Ct. No. 2008CV63

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CATHERINE CONNOR DEBARROS,

PETITIONER-RESPONDENT,

V.

**DEPARTMENT OF NATURAL RESOURCES AND DIVISION OF HEARINGS
AND APPEALS,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Forest County:
LEON D. STENZ, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Department of Natural Resources and Division of Hearings and Appeals (collectively “DNR”) appeal a circuit court order reversing the DNR’s denial of an application for a water quality certification for

road construction through a wetland. We reverse the circuit court and affirm the DNR's denial of certification.

¶2 Catherine deBarros applied for water quality certification for construction of a road through wetland property in order to shorten the distance between her house and her parents' house. The property is owned by CGIP Lake Partners LLP, of which deBarros and her three brothers are partners. The application and subsequent information provided at the DNR's request represented that deBarros would have no access at all to her house without the wetland-filled road. The DNR granted the certification because of the absence of practical alternatives.

¶3 In the course of granting the application, the DNR followed the wrong procedure and gave the public an extra thirty days within which to request an administrative hearing on the water quality certification.¹ Within the second thirty-day period for public input, certain individuals discovered road construction and requested a contested case hearing on the application. In the course of the administrative hearing, it was discovered that deBarros had provided false information in the application. Specifically, it was established that deBarros

¹ deBarros' project involved a wetland above the ordinary high water mark of a navigable waterbody, and thus the procedure under WIS. ADMIN. CODE § NR 299.05(4) (Jan. 2003), applies: the DNR makes its final decision on the application and issues a public notice that provides the public thirty days to request an administrative hearing on the decision. For projects involving wetlands below the ordinary high water mark of a navigable waterbody, the procedure under WIS. STAT. § 30.208 (2007-08), applies: the DNR issues a tentative decision and public notice giving the public thirty days to submit comments or request an informational hearing, and then the DNR issues a final decision giving the public another thirty days to request an administrative hearing. *See* WIS. ADMIN. CODE § NR 2.05 (Sept. 2004). Here, the DNR followed the two-step WIS. STAT. ch. 30 (2007-08), procedure for a one-step WIS. ADMIN. CODE ch. NR 299 (Jan. 2003), project.

All references to the Wisconsin Statutes are to the 2007-08 version.

retained access to her house without the wetlands-filled road, and that documents purporting to show the contrary were false.

¶4 After the hearing, the administrative law judge denied the application because the project would result in a violation of wetland standards. The ALJ also reiterated an earlier denial of a motion to dismiss the hearing, rejecting an argument that the requestors lacked standing as a result of the DNR erroneously extending by thirty days the time for public challenge.

¶5 After deBarros timely petitioned for judicial review of the order, the circuit court reversed the DNR and reinstated the water quality certification. The court found that the DNR's failure to follow the proper procedure denied deBarros' constitutional rights to fundamental fairness, due process and equal protection. This appeal follows.

¶6 At the outset, we note the circuit court decided *sua sponte* that the DNR's procedural error violated deBarros' constitutional rights. Better practice would have required those issues to be thoroughly briefed and fully presented. *See Just v. Marinette County*, 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972). However, because the DNR and deBarros have placed the constitutional issues before us, and because the constitutional issues are questions of law, we will determine whether the circuit court correctly determined the issues.

¶7 Due process is an exact synonym for fundamental fairness. *See D.M.D. v. State*, 54 Wis. 2d 313, 318, 195 N.W.2d 594 (1972). In evaluating a substantive due process claim, the threshold inquiry is whether there has been a showing of a deprivation of a liberty or property interest protected by the constitution. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997). Here, deBarros offers no developed analysis concerning

a deprivation of a constitutionally protected liberty or property interest.² We will not consider undeveloped and unsupported arguments. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Nor has de Barros shown the DNR intentionally provided the wrong permit notice with an illegitimate animus such that the circuit court's equal protection determination could be sustained. *See Penterman*, 211 Wis. 2d at 484-85.

¶8 With regard to the DNR's procedural error, deBarros was deprived of neither access to nor use of her property. The wetland-fill project was on property not owned by deBarros but, rather, by CGIP. Undisputed evidence at the administrative hearing established that she could continue to access and use her property without the wetland-fill project as she had during and since the construction of her house.

¶9 Nevertheless, deBarros insists in conclusory fashion that her constitutional rights were violated by the DNR granting an additional thirty-day period of review. deBarros essentially argues that if the DNR had issued the proper notice, the requestors would not have seen the road in time to seek the hearing. However, deBarros cites no caselaw supporting vested rights in a certification that itself was issued based upon false information in the application. Accordingly, we conclude the circuit court erroneously decided the constitutional issues.

² Although deBarros cites generally to *Penterman v. Wisconsin Electric Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997), she offers no developed caselaw analysis or argument concerning a deprivation of a liberty or property interest.

¶10 Because the circuit court considered dispositive the issue of whether the DNR followed the proper procedure, it did not reach the merits of the DNR's decision denying certification for the wetland fill. deBarros does not present on appeal a developed argument concerning the merits of the DNR's decision. Regardless, we affirm the DNR's decision denying certification on its merits.

¶11 We review the DNR's decision on this issue, not the circuit court's. See *Hilton v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166. When the DNR adopts the ALJ's decision as its own, we review the ALJ's determination. *Id.*, ¶14. Our review is limited to the administrative record. WIS. STAT. § 227.57(1).

¶12 The ALJ determined that:

The project results in violation of the standards set forth in WIS. ADMIN. CODE § NR 103.08(3) [(Mar. 2005)], in that a practicable alternative to the project exists that will not adversely affect wetlands and the project results in significant adverse impact to wetland functional values of the affected wetland and significant adverse impacts to water quality. The water quality certification must be denied pursuant to WIS. ADMIN. CODE [§] NR 299.05 [(Jan. 2003)].

¶13 The ALJ's application of WIS. ADMIN. CODE chs. 103 and 299 is due great weight deference because the DNR is charged by the legislature with administering standards of water quality and the DNR has historically done so for wetlands based upon its expertise and specialized knowledge. See WIS. STAT. §§ 281.11, 281.12(1), 281.15(1), 281.15(2)(b); *Hilton*, 293 Wis. 2d 1, ¶¶15, 20; *Sterlingworth v. Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 732, 556 N.W.2d 791 (Ct. App. 1996). Under great weight deference, we uphold the DNR's conclusions if they are reasonable, "even if an equally reasonable or more reasonable interpretation is offered." *Hilton*, 293 Wis. 2d 1, ¶17. Furthermore,

the DNR's factual findings are entitled to substantial deference under the substantial evidence test if reasonable minds could arrive at the same conclusion after considering all the evidence. *Id.*, ¶17.

¶14 At the administrative hearing, deBarros had the burden of proving the project satisfied the requirements of WIS. ADMIN. CODE ch. NR 103, namely, that there is no practicable alternative and there are no significant adverse impacts. *See* WIS. ADMIN. CODE § NR 2.13(3)(b) (Sept. 2004). She presented no evidence or testimony at all about the environmental impacts of her project. In contrast, the DNR experts testified without impeachment as to the significant direct and cumulative adverse impacts of the project.

¶15 Moreover, deBarros' false representations in her application materials initially led the DNR to find no practicable alternative existed. At the contested hearing, the DNR staff testified that accurate information about the existing road subsequently established that it was in fact a practicable alternative. Significantly, deBarros did not present any evidence showing the existing road was not a practicable alternative to the new road through the wetland.

¶16 In his findings of fact, conclusions of law and order denying certification, the ALJ determined, "There was no testimony presented to counter the very strong inference arising from the evidence that persons acting on the Applicant's behalf intentionally submitted false and inaccurate information to the

Department in order to secure the WQC.” The ALJ’s findings and conclusions are reasonable and supported by substantial evidence.³

By the Court.—Order reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ The DNR also argues deBarros’ position on appeal is compromised by the clean hands doctrine in equity. deBarros failed to respond to this issue and it is therefore deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 Ct. App. 1979) (arguments not refuted deemed admitted). In any event, without deBarros’ own misrepresentations in the application material, the DNR would not have issued the certification. Therefore, deBarros obtained a certification based upon inaccurate, incomplete and misleading information. She also proceeded with her project without correcting the misinformation. After a hearing at which the correct information came out, and at which she had the opportunity to explain the application and to show she met the criteria for certification, the evidence established that her project did not meet the criteria for certification. It is therefore clear deBarros lacked clean hands.

